No. 73-1120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL HELIUM CORPORATION, CITIES SERVICE HELIUM, INC., PHILLIPS PETROLEUM COMPANY,

Petitioners,

v.

ROGERS C. B. MORTON, Secretary of the Interior, and ELMER F. OSBORN, Director, Bureau of Mines, Department of the Interior,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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The respondents' argument that certiorari should be denied rests in large part on their total misconception of what the court below held. Their argument is no

proper basis for this Court's not deciding the important issues presented on the record here concerning the standard and scope of judicial review of an agency's substantive and procedural compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, and the availability of judicial review of an agency's substantive decision under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

1. The respondents acknowledge that, if the court below rejected judicial review of the action of the Secretary of the Interior terminating the helium conservation program for compliance with the substantive dictates of the National Environmental Policy Act, its decision conflicts with those of other circuits. (Br. in Opp. 11.) There is no doubt that the court rejected outright judicial review of an agency's substantive compliance with NEPA, that is, judicial review of the Secretary's decision on the merits to determine whether he complied with the substance of NEPA. This rejection is the basis for the first question presented in the petition. (See Pet. 11-15.) The court held that "we conceive of the review of the Secretary's action as being strictly limited to compliance with the requirement of the environmental impact statement," which includes the Secretary's consideration of the statement. (App. 8a.) Despite this clear holding, the respondents argue that it is possible to read the decision as a determination on the merits that the Secretary's action "was unquestionably not arbitrary or capricious." (Br. in Opp. 11.)

As reasons for not taking the court at its word concerning the strict limits of its review, the respondents

cite references that are not even remotely supportive of their position. [1]

Respondents then argue that in any event there is no need for the Court to resolve the conflict over the availability of substantive NEPA review at this time. (Br. in Opp. 12.) This assertion is apparently based on the paragraph that follows it, which is a distillation of the Secretary's own statement of reasons for terminating the conservation program and not of any analysis found in the Court of Appeals' decision sustaining his action. This is obviously not the place for an extended discussion of the merits of the Secretary's decision. Petitioners would say merely that respondents' argument grossly distorts the record, the nature of the choice that the Secretary had to make and the nature of his decision.

Lest this distortion be allowed to stand, petitioners add this much: The record below demonstrates that

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[1] Respondents cite (Br. in Opp. 11 n.10):

(a) a page from the court's *prior* 1971 opinion in this case (App. 82a), which does not and could not indicate any view on the question of the availability of substantive NEPA review, since at that stage in the suit NEPA had been wholly ignored by respondents and an impact statement not even prepared; (b) an opinion in another case, *Davis* v. *Morton*, 469 F.2d 593 (10th Cir. 1972), in which the court said that agencies were bound to follow both the "substantive" and the "procedural" mandates of NEPA, but in which the only NEPA issue before the court was whether a particular action was major federal action so as to call for an impact statement; and (c) the opinion of the concurring judge below, which is significant for the very fact that the majority did not follow his lead in passing on whether the Secretary "balanced environmental factors with other pertinent factors" and on that basis judging whether the Secretary's action was arbitrary, capricious or an abuse of discretion (App. 19a).

the only economical source of helium today is natural gas. Contrary to what the Secretary said and what his counsel now assert, there have not been any significant discoveries of natural gas rich in helium since the helium conservation program started. Helium-rich natural gas is concentrated in the fields of Texas, Oklahoma and Kansas from which the helium contractors have been extracting helium. The fields are relatively old, extensively developed ones; the natural gas in them is being used as fuel and will be exhausted well before the end of the century. There is in storage under the conservation program no more than the quantity of helium that was expected to be in storage at this time when the program started. Current demand for helium has slackened, but the key point is that helium remains essential to new environmentally favorable means of generating and transmitting power. This nation will find it necessary to turn to such means as fossil fuel sources are depleted. When the helium-bearing natural gas and the stored helium are exhausted, the only source of helium for use in such devices as superconductors of electricity and magnetohydrodynamic and nuclear fission power generators will be the atmosphere, and helium can be extracted from the atmosphere only at untold monetary and environmental cost.

The refusal of the Court of Appeals to decide whether the Secretary in his decision adequately weighed such factors as these is thus not of mere academic interest, as respondents seem to contend. This is a case in which it made a difference since the impact of the Court of Appeals' decision is completely to bar judicial review of the factual basis of the Secretary's decision to terminate a major conservation program mandated by the Congress involving a valuable and wasting natural re-

source to which NEPA obviously applies. Thus, the case is an altogether appropriate vehicle for resolving the critical question whether courts are empowered to review agency decisions for substantive compliance with the requirements of NEPA.

2. Respondents assert, without citation to the record or any authority, that the court below "correctly reaffirmed its earlier determination that the Secretary did not violate the Helium Act . . . ." (Br. in Opp. 10.) This bald assertion ignores the plainest possible statement of the Court of Appeals, which rejected "plaintiffs' argument that review of the termination is permissible under the Administrative Procedure Act." (App. 8a.) It was with this summary declaration that the Court of Appeals disposed of the case once and for all and remanded it to the District Court for dismissal, foreclosing forever all judicial inquiry into matters that the District Court, on its view of NEPA's requirements, did not need to reach—matters concerning the meaning and legislative history of the 1960 Helium Act Amendments and whether the Secretary's decision to terminate the conservation program contracts properly heeded the goals of the legislation.[2]

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[2] As we pointed out in our petition (Pet. 18), the Court of Appeals stated elsewhere that it did not "perceive any violation of the 1960 Helium Act Amendments" (App. 8a), and it earlier said that the matter of termination was left entirely to the discretion of the Secretary "and he was within his rights in terminating the contracts." (App. 7a.) But these afterthoughts cannot change the basis of the court's disposition of the case as unreviewable except on narrow NEPA procedural grounds, nor can they substitute for the broad ranging inquiry into the record required by the Administrative Procedure Act in determinations that are reviewable.

The important questions arising from the summary denial of judicial review under the APA, which are embraced in the second question presented in the petition, are not downed by respondents' mere assertion. These questions include: (a) whether the termination of the conservation program was so far committed to the Secretary's discretion that the case falls within the narrow exception to the APA judicial review provisions, 5 U.S.C. § 706, for discretionary agency action (a proposition that the court below may have meant to advance but that respondents have not embraced and cannot logically embrace); and (b) whether sovereign immunity barred review on non-NEPA grounds or whether, on the other hand, as other courts of appeals have held, the judicial review provisions of the APA constitute a waiver of sovereign immunity for cases within the scope of the Act (Pet. 15-22).

3. With respect to the third question raised in the petition, pertaining to the erroneous standard that the Court of Appeals applied in reviewing the one thing it did review, procedural compliance with NEPA, respondents in their brief in opposition simply ignore the court's own statement that it looked only for "an objective good faith effort to comply with the statutory procedural requirements." (App. 10a.) Judges of the courts of appeals with whose NEPA decisions respondents argue that this standard is in accord (Br. in Opp. 8-9) would no doubt be as surprised as anyone at the thought that they had expressed themselves as satisfied with a mere "effort" at compliance, in whatever good faith such an effort may have been made. Respondents erroneously cite as consistent with the view of the court below, *Environmental Defense Fund* v. *Armstrong,* 487 F.2d 814 (9th Cir. 1973), pet. for

cert. pending, No. 73-1179. That case clearly holds the proper standard for review of impact statements to be the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A), citing *Life of the Land* v. *Brinegar,* 485 F.2d 460 (9th Cir. 1973) and *Silva* v. *Lynn,* 482 F.2d 1282 (1st Cir. 1973). 487 F.2d at 817. The arbitrary and capricious standard is the standard of review applied by the District Court below and expressly rejected by the Court of Appeals (App. 9a-10a). The *Armstrong* decision thus presents a further reason for granting the writ in this case. The concurring judge recognized the conflict among the circuits on the question of the standard of review of impact statements (App. 18a), and the *Armstrong* decision is but another example of that conflict.

Respondents have not offered any compelling reasons for denying review of the important and far-reaching questions presented in this case. The petition should be granted.

Respectfully submitted,

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